LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
DEC 31 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

Petitioner,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Respondent.

Answer to Petition for Rehearing.

JOSEPH D. RYAN,
100 N. LaSalle Street,
Chicago, Illinois,
Attorney for Petitioner.

Midwest Law Printing Co., 340 W. Huron St., Chicago

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

Petitioner,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Respondent.

ANSWER TO PETITION FOR REHEARING

I.

The interpretation placed on the Safety Appliance Act in this case is consistent with the judicial construction of the Act, which has remained unchanged for more than 40 years, and with the intent of Congress as explained in the preamble to the Act.

Defendant's assertion that this Court found it necessary to change the "theory of negligence upon which the

plaintiff pleaded" and tried her case in the trial court and "argued it in both reviewing courts to a theory of non negligence and to ignore altogether the theory upon which the defendant tried its case" is simply not true, as shown by: (1) plaintiff's requested instructions (R. 261, 262); (2) by the argument made to the jury by counsel for the plaintiff (R. 146); (3) by the argument made by counsel for the defendant (R. 156, 158, 159); (4) by defendant's pleading (R. 14) and its motion for a directed verdict which was based on the sole ground that the breaking of a coupler did not come within the purview of the Act (R. 144); (5) by plaintiff's written motion for a new trial (R. 224-230); and (6) by the briefs filed in the Court of Appeals and in this Court.

The plaintiff pleaded and tried her case on the theory that the breaking apart of the coupler in question established a violation of the Safety Appliance Act as a matter of law and was in and of itself negligence *per se* rendering the defendant absolutely liable if such breaking caused or proximately contributed to cause the death of decedent.

While the plaintiff's complaint (R. 13), it is true, alleges that the defendant negligently failed to equip and maintain on the car in question a safe and efficient coupler that would remain coupled to the car to which it was attached, the characterization of defendant's failure to comply with the Act as negligence was wholly unnecessary and should have been so regarded and treated as surplusage by the trial court. Under the undisputed evidence in this case, in the light of this Court's construction of the Act, imposing on the railroads a positive duty to furnish safe couplers, the refusal to give plaintiff's requested instructions 4, 5, 6 and 7 (R. 261, 262),

which set forth all the facts essential to her right to recover, independently of any question of negligence on the part of either the plaintiff or defendant, and directed the jury to find for the plaintiff if the breaking of the coupler caused or proximately contributed to cause the death of decedent, constituted reversible error. The instructions given by the court at the request of the defendant that the happening of the accident created no presumption of negligence on the part of the defendant (R. 187); that that was an affirmative fact for the plaintiff to prove; that it was not sufficient for the plaintiff to prove "that defendant may possibly have been guilty of negligence, the evidence must show that it was guilty of negligence" also constituted reversible error even on defendant's theory—which was advanced for the first time on appeal—that the jury had the right to infer from the breaking of the coupler that the defendant was negligent, or that the jury "could infer that the railroad had violated the prohibition of the Acts * * *" as stated in the dissenting opinion herein.

In particular, the plaintiff tendered instructions on the non negligence theory, which were refused by the trial court, and the defendant tried its case on the theory that it could not be held liable under the Safety Appliance Act unless it was guilty of negligence.

The first 12 pages of Defendant's Petition are devoted to a historical review and argument intended to show that the sole Congressional purpose of Section 2 of the Safety Appliance Act was to prevent the necessity of men going between the cars in coupling operations. Having labored this point in some detail, the Defendant finally concedes, p. 12:

> "We do not contend that liability under the statute is limited to men injured while coupling or uncoupling cars; the contrary has long since been settled."

If the Act is not limited to coupling operations, why did Defendant find it necessary to devote a large part of its Petition to proving that it should be so limited?

The moral which defendant seeks to draw from its review seems to be that "the only mandatory duty • • • imposed • • • was to provide cars with uniform and automatic couplers in order to reduce the heavy toll of accidents in coupling and uncoupling operations." If this be so, then the courts were wrong in their repeated decisions which failed to limit the liability to men engaged in coupling operations. Or perhaps defendant envisages a statute which can be split up into parts, one which is mandatory, the other not. Defendant's argument is not persuasive.

The Safety Appliance Act itself belies defendant's contention that its sole purpose was to prevent men from going between the cars. The Act as originally passed, which still stands unchanged (March 2, 1893, Chapter 196, 27 Stat. 531), was preceded by the following preamble:

> "An act to promote the safety of employees and travelers upon railroads by compelling carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes."

If keeping employees from going between the cars were the only consideration, why did Congress refer specifically to promoting the safety of *travelers?* Travelers have nothing to do with going between the ends of cars to effect couplings, or for any other purpose. It seems fundamental to us that when Congress required automatic couplers to be provided for the purpose of promoting the safety of travelers, it is no unwarranted ex-

tension of the Congressional intent to hold that the couplers must not break while in use.

How could the Safety Appliance Act inure to the benefit of the traveling public if the railroads might, with impunity, use and maintain defective couplers, provided they could be coupled or uncoupled automatically by impact? Should the railroads be heard to say, as the defendant insists in this case and as the Court of Appeals found, that the Safety Appliance Act did not require the defendant to furnish couplers that would not break? We submit that to ascribe to Congress, in the enactment of the Safety Appliance Acts, an intent to require couplers to couple and uncouple automatically without regard to their condition or safety in other respects, would defeat one of the fundamental purposes sought to be accomplished.

The construction of the Safety Appliance Act which the Court has announced in this case, while removing an uncertainty of long standing, is not revolutionary, nor is it out of harmony with previous decisions of this Court. The absolute duty (as to men engaged in coupling operations) to maintain couplers in the condition prescribed by the statute is conceded by the defendant.

This Court, in *St. Louis & I. M. Ry.* v. *Taylor*, 210 U.S. 281, *Chicago B. & Q. R. Co.* v. *United States*, 220 U. S. 559, and *Delk* v. *St. Louis & San Fran. R. Co.*, 220 U.S. 580, laid down the fundamental principles of construction of the Act. The *Taylor* case was decided in 1908. In the 41 years which have elapsed since that decision, Congress has not seen fit to change the Act in any way, and will be presumed to have acquiesced in the construction which was adopted by this Court.

More recently this Court held that the protection afforded by the Act extended to persons only remotely affected, such, for instance, as travelers on the highway (*Fairport R. Co.* v. *Meredith,* 292 U.S. 589). Moreover, while it may be true that the most urgent reason for enacting the Safety Appliance Act was the appalling number of accidents occurring when men went between the cars, yet when Congress has plainly indicated that it had other considerations also in mind, and this Court has announced a rule of liberal statutory construction, it is untimely to seek to turn the clock back and resort to a narrow and strict construction of the Act. The construction of the Safety Appliance Act is no longer an open question.

In the case of *Louisville & N. R.R. Co.* v. *Layton,* 243 U. S. 617, wherein it was contended by the defendant that the Act in question was intended only for the benefit of employees injured when actually engaged in coupling or uncoupling cars, this Court said, pp. 620, 621:

> "While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts, and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law spring from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured."

In the case of *Swinson* v. *Chicago St. M. & O. R. Co.,* 294 U. S. 529, this Court also stated:

"• • • an employee 'can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection,' "

Defendant repeats the groundless assertion that it tried its case solely on the theory that the decedent was not killed on the movement when the coupler broke and that therefore any conceivable error in the instructions "was wholly harmless." It urges that the majority opinion in extending the mandatory duty of the defendant to provide couplers which will remain coupled " 'until set free by some purposeful act of control' • • • denies this defendant the benefit of the jury's verdict in its favor on the issue of causation."

This assertion is contradicted by the record. Defendant argued to the jury that the railroad company was not negligent "as concerns that coupler" (R. 158) and that there was no evidence that the coupler failed to function as the statute required (R. 159). Defendant procured instructions requiring the jury to find it guilty of negligence before recovery could be had. While it is true the defendant also argued that the decedent was killed in the last movement instead of the first, it cannot be successfully maintained that this was its sole theory, or that the jury ever considered or passed upon that issue.

In the concluding paragraph of its Petition, defendant asserts that the plaintiff failed to submit any requests that the jury be instructed on the "theory of non-negligence upon which this Court predicates its decision." Plaintiff's requested instruction No. 5, R. 261, 262, told

the jury that if the broken coupler caused decedent's injuries, the defendant should be found guilty, and negligence or contributory negligence were immaterial. Requested instructions Nos. 6, 7 and 8, R. 262, were also predicated on the "non-negligence" theory. Thus it appears that plaintiff attempted to have the jury instructed in accordance with the views expressed by this Court in its opinion.

Defendant in the same paragraph makes the further statement that the case "was tried upon the sole issue whether the decedent was killed in the movement upon which the coupler broke, or in the final movement out of the yard." We pointed out in our Petition, pp. 30, 31, that the defendant argued to the jury, over our objection, but with the court's approval, as follows (R. 158):

> "The law does not say anything whatever about couplers which break, and I think after you hear Judge Campbell's instructions as to what the law is you will conclude that the requirements of the law, so far as a coupler breaking is concerned, is that the railroad company must use ordinary and reasonable care. There is not a word of evidence here that there was anything about the condition of this coupler which could have caused anyone to believe that it was at all likely that it would break. So I say if that is the law you must necessarily find that there has been no proof here that the railroad company was negligent as concerns that coupler."

This contention was also emphasized by the trial court in its instructions. It follows that defendant's assertion

that "The jury obviously found that the breaking of the coupler had nothing to do with the accident," is not supported by the record. As we have heretofore shown, the jury under the court's instructions was not required to consider or make any finding on this issue.

It is alleged in one paragraph of the plaintiff's complaint (R. 261) that while decedent was at work between the cars on track 5 the defendant "negligently propelled and impacted two or more of the said cut of cars upon and against the said standing cars where plaintiff's decedent was at work as aforesaid." The Federal Employers' Liability Act rendered the defendant liable for any negligence on the part of any of its officers, agents or employees or by reason of *any defect or insufficiency due to its negligence in its cars, engines, appliances, etc.*

Evidence was introduced by the plaintiff tending to prove that the defendant was guilty of negligence as charged in said paragraph. The trial court's charge to the jury that under this paragraph of her complaint the plaintiff was required to prove negligence on the part of the defendant before she could recover was entirely proper, but it was not limited to the charge as set forth in that paragraph but was made equally applicable to the one remaining paragraph which plaintiff pleaded and relied upon (as shown by her requested instruction—R. 261, 262) which charged a violation of the Safety Appliance Act. The jury might well have found, independently of the Safety Appliance Act, that the defendant was guilty of negligence under the Federal Employers' Liability Act and the plaintiff was entitled to have the jury instructed to that effect. In instructing the jury that the plaintiff was required to prove negligence on the part of defendant under both paragraphs of her com-

plaint was deprived of all benefits accruing to her under the provisions of the Safety Appliance Act.

II.

A party is entitled to a jury trial only when there is a dispute as to the facts or when different inferences can be reasonably drawn therefrom. There was no dispute as to the breaking of the coupler, hence proximate cause was the only question which properly should have been submitted to the jury.

In the cases referred to by the defendant in support of its contention that the ruling of this Court deprives it of its right to a jury trial, factual disputes were involved. Where it is claimed that a brake did not function at the time of the accident, although it was in working order both before and afterwards, a question of fact necessarily arises. Where the claim is made that ice on the tender renders the locomotive unsafe to operate, opinions of reasonable men might very well differ. In our case, however, no disputed question of fact regarding the couplers was involved. It is not claimed that they did not break; it must be conceded that they were not in condition to function. No factual question as to the violation of the Act arose. Of course, if there is no fact question, it is not necessary nor is it proper to submit it to the jury. Nor is the defendant being deprived of its right to a jury trial under such circumstances. In the instant case, the defendant would still be entitled to the verdict of the jury on the question of proximate cause, and on the question of damages. These are the only factual questions open.

The finding by the Court of Appeals that the Act did not require the defendant to "furnish couplers that would

not break" but that the jury may, if they think it reasonable, "infer that the coupler was defective and was furnished and used in violation of the Act" was rejected by this Court. That the jury had the right to infer from the breaking and separation of the cars that the Act had been violated is, we diffidently submit, an anomalous and inconsistent conclusion. That the jury "was adequately instructed to that effect" as stated in the dissenting opinion herein (in the light of the repeated admonition in the judge's charge to the jury that in order to entitle the plaintiff to recover it was incumbent upon her to prove negligence on the part of the defendant) we also submit is not justified and is without support in the record.

Respectfully submitted,

JOSEPH D. RYAN,
Attorney for Plaintiff.